314 U.S. 67

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In The

Supreme Court of the United States

.....TERM, 1941

NO. 730

314 U.S.
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A. B.,
Petitioner,

vs.

C. D.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SAMUEL GEORGE WAGNER,
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In The

SUPREME COURT OF THE UNITED STATES

.....**TERM, 1941**

NO......

A. B.,
Petitioner,

vs.

C. D.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Petitioner, A. B., prays that a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, may issue to review the decree of that Court made upon July 8, 1941.

Proceedings

(a) District Court

This was a civil action in the nature of fraud and deceit brought by a lady, known as A. B. in the proceedings

below and herein, and C. D., a man. The alleged deceit was that there were continuing false, wilful and fraudulent promises of marriage made by C. D., and which were known by him to be such, to A. B., promising to marry her, and at the same time never intending to marry her, but on the contrary making these promises and representations with an intent to deceive the plaintiff and to procure favors from her and to have her alter her position from time to time. Relying on these promises, she remained unmarried; held herself in readiness to marry the defendant; made trips at his request, and on account of these promises; and made gifts to him; and was put to other great expense. The action was brought to recover the value of these gifts and expenses which the plaintiff was put to, and for punitive damages. The defendant filed a motion to dismiss the complaint for failure to state her cause of action and a motion to strike the complaint in the record as containing scandalous matter and having been filed in violation of law (C. C. App. 5). After argument before Hon. Guy K. Bard, the both motions of defendant were granted and the complaint was ordered dismissed and stricken from the record as being within the prohibition of the Pennsylvania "Heart Balm" Act (1935 P. L. 450, as amended, 48 PS 179 et seq.)

(b) Circuit Court of Appeals

Notice of the appeal was filed with the Circuit Court on March 5, 1941. The matter came for argument before the Circuit Court of Appeals on July 8, 1941, on which date a per curiam opinion was handed down affirming the District Court on the opinion of Judge Bard.

(c) Supreme Court of the United States

A petition for extension of time in which to file a petition for writ of certiorari was duly presented and on July

24, 1941 the time was extended until November 8, 1941, inclusive.

Parties

(a) Petitioner Herein

The plaintiff is a citizen of the State of New York, a resident of New York City.

(b) Respondent Herein

The respondent herein, as well as in the Circuit Court of Appeals and in the District Court, is a resident of the Commonwealth of Pennsylvania.

Summary Statement of the Matter Involved

(a) As to the Substantive Matter

The petitioner, a citizen of the State of New York, brought this civil action, in the nature of fraud and deceit, alleging that in 1935, and on subsequent occasions, the respondent, C. D., promised to marry her, and that these promises and representations were made wilfully, falsely and fraudulently, and were known to be such by the defendant, he never intending to marry her, but on the contrary he made these promises and representations with an intent to deceive the plaintiff and to procure favors from her and to have her alter her position from time to time. It was further alleged that the plaintiff relied upon these promises and representations and was thereby induced to remain unmarried; hold herself in readiness to

marry the defendant; made trips at his request and on account of these promises; made gifts to him; and was put to other great expense. The action was brought for the recovery of the value of these gifts and the expenses to which the plaintiff was put, and for punitive damages, and not for the loss of the bargain and damages resulting therefrom. In discussing the substantive part of this case, the District Court took the viewpoint that "there is a policy enunciated by these enactments abolishing breach of promise actions which is broader than their letter," referring to the so-called "Heart Balm" Act in force in Pennsylvania, Act of June 22, 1935, P. L. 450, as amended, 48 PS 170, et seq. and in New York by Act of March 29, 1935, N. Y. Laws Ch. 263, adding Civil Practice Act, Sec. 61-a et seq., and concluded that a tortious act, such as we have in this case, was within the coverage of these statutes and hence no action could be brought for the recovery of the monies expended. This the Circuit Court of Appeals affirmed.

(b) As to Procedure

The petitioner filed a complaint in the District Court (C. C. App. 2-4) to which the respondent, the defendant in the lower court, filed a motion to dismiss the complaint and a motion to strike (C. C. App. 5). Amendments to the complaint were filed and allowed (C. C. App. 6-7). After argument on the two motions before Judge Bard, an opinion and order was handed down sustaining the defendant and dismissing the complaint. An appeal to the Circuit Court of Appeals for the Third Circuit was then filed by the petitioner herein which was argued before the court en banc (Biggs, Maris and Clark, Circuit Judges), which, on the same day, handed down a per curiam opinion affirming the judgment of the District Court "upon the opinion of Judge Bard, 36 F. Supp. 85." (App. 9)

Jurisdiction

The Supreme Court is asked to exercise its jurisdiction under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347, 43 Stat. 938), or under Section 262 of the Judicial Code (28 U. S. C. A. 377, 36 Stat. 1162): In Re 620 Church St. Corp., 299 U. S. 24, 26 (1936).

Questions Involved and Reasons for Allowance of Writ of Certiorari

DID THE CIRCUIT COURT OF APPEALS ERR IN AFFIRMING THE SUMMARY DISMISSAL OF THE COMPLAINT IN A CIVIL ACTION IN THE NATURE OF DECEIT ON THE GROUND THAT THE SAME WAS WITHIN THE PROHIBITION OF THE PENNSYLVANIA "HEART BALM" ACT WHERE THE PLAINTIFF, A WOMAN, SEEKS TO RECOVER THE VALUE OF GIFTS MADE AND EXPENSES INCURRED BY HER AT DEFENDANT'S REQUEST AND IN CONTEMPLATION OF MARRIAGE AND UPON THE FALSE AND FRAUDULENT PROMISES AND REPRESENTATIONS OF MARRIAGE, WHICH THE DEFENDANT KNOWINGLY AND FALSELY MADE?

This question is one of great importance because of the fact that there are now at least seven other states besides New York and Pennsylvania which have so-called Heart-Balm acts. These others are New Jersey (P. L. 1935, Ch. 279; N. J. St. Annual 1935, sec. 163-411 et seq.); Michigan (Act No. 127, Public Acts 1935); Massachusetts (Vol. 6, Ch. 207, sec. 47-A, Annotated Laws Mass. 1938, 350, sec. 1, approved May 24, 1938); Indiana (Ch. 208, Laws 1935, 2 Burns Statutes Annotated, sec. 2-508 through 2-510); Illinois (Acts of 1935, Ch. 38; 7 Statutes Annotated, Ch.

37.052); California (Ch. 128, p. 1245, Statutes 1939, approved May 10, 1939); and Alabama (Statutes 1935, p. 780). With the exception of the case at bar, the only other case pertaining to a right of action for fraud and deceit, where actual damage, other than a broken heart or disappointment was shown, was the case of *Snyder v. Snyder*, 20 N. Y. S. 2d 815, which was cited by the lower court, as well as commented upon by the petitioner on page 18 of her Argument which appears in the Brief for Appellant filed in the Circuit Court. In support of the petition for a writ of certiorari, we adopt the argument used by your petitioner in the U. S. Circuit Court of Appeals, which is found on pages 3-19 inclusive in the Brief for Appellant, copies of which are furnished herewith. Unless jurisdiction is entertained by your Honorable Court, the decision of the lower court, the affirming of the Circuit Court, will become a leading precedent resulting in great harm and injustice to the petitioner as well as others similarly situated.

Wherefore, your petitioner respectfully prays that she be afforded the following relief:

(1). Reverse or remand the case to the District Court for determination of the same upon the merits; or

(2). Grant and issue a writ of certiorari upon the Circuit Court of Appeals for the Third Circuit to the end that this cause may be reviewed and determined by this Court and the order of the Circuit Court of Appeals and of the District Court of the United States for the Eastern District of Pennsylvania may be reversed and that your petitioner may have such other and further relief as this Court may deem proper in the premises.

Dated at Pittsburgh, Pennsylvania, October 25, 1941.

Respectfully submitted,

SAMUEL GEORGE WAGNER,
DOROTHEA M. WAGNER,
WAGNER & WAGNER,
DAVID L. ULLMAN,
By: S. G. WAGNER,
Attorneys for Petitioner.

APPENDIX

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Third Circuit

No. 7717 October Term, 1940

A. B.,
Appellant,

vs.

C. D.,
Appellee.

And afterwards, to wit, the 8th day of July, 1941, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable William Clark, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 8th day of July, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Third Circuit

No. 7717 October Term, 1940

A. B.,
Appellant,
vs.
C. D.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Biggs, Maris and Clark, Circuit Judges.

Per Curiam.

The judgment of the district court is affirmed upon the opinion of Judge Bard, 36 F. Supp. 85.

Endorsements:
Opinion Per Curiam
Received and Filed July 8, 1941
Wm. P. Rowland, Clerk

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Third Circuit

No. 7717 October Term, 1940

A. B.,
Appellant,
vs.
C. D.,
Appellee.

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

JOHN BIGGS, JR.,
Circuit Judge.

Philadelphia,
July 8, 1941.

Endorsements:
Order Affirming Judgment
Received and Filed July 8, 1941
Wm. P. Rowland, Clerk

United States of America
Eastern District of Pennsylvania *Sct.*
Third Judicial Circuit

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of A. B., Appellant vs. C. D., Appellee, No. 7717, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 3d day of October in the year of our Lord one thousand nine hundred and forty-one, and of the Independence of the United States the one hundred and sixty-sixth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. —

A. B., Petitioner,

vs.

C. D.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

On Consideration of the application of counsel for the Petitioner,

It Is Ordered that the time for filing petition for certiorari in the above entitled cause be, and the same is hereby, extended to and including November 8th, 1941.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 3rd day of October, 1941.

(7222)

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IN THE

Supreme Court of the United States

October Term, 1941

No. 730

A. B.,
Petitioner,
v.
C. D.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS RAEBURN WHITE,
Attorney for Respondent.

1930 Land Title Building,
Philadelphia, Pa.

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I. REFERENCE TO OFFICIAL REPORT OF OPINIONS IN THE COURTS BELOW.

The opinion of District Judge Bard is reported in 36 F. Supp. 85. The case in the Circuit Court of Appeals has not as yet been reported.

II. COUNTER-HISTORY OF THE CASE.

This is a suit for breach of promise to marry, an action forbidden by the laws of the State of New York (the residence of the petitioner) and of Pennsylvania (the residence of the respondent). Petitioner attempted to evade the prohibition of the statutes by alleging that the suit was brought not for the breach of promise but for deceit by respondent in making a promise which he never intended to perform. The complaint as originally filed is contained in an appendix to appellant's brief in the Circuit Court of Appeals submitted by petitioner (pp. 2-4 of appendix). It avers that petitioner suffered damages in that, relying upon the promises of respondent, "she was thereby induced to and did remain unmarried"; held "herself in readiness to marry the defendant; made frequent trips with, for and on behalf of the defendant and at his urgent suggestion and request because and on account of his promises; and was put to great expense in the purchase of clothes and gifts, making trips, and otherwise."

It was further alleged that "in addition to the monetary loss, the plaintiff has suffered great humiliation, anxiety, inconvenience, emotional distress, mental anguish and otherwise."

A motion having been made to dismiss this complaint on the ground that it did not state a cause of action upon which relief could be granted, petitioner amended the same by adding the adjectives "wanton" and "oppressive" as descriptive of respondent's promises and conduct, and by striking from the complaint paragraph 9, which alleged "humiliation, anxiety, inconvenience, emotional distress, mental anguish and otherwise."

The motion being renewed, the court dismissed the complaint and ordered it stricken from the record on the ground that it had been filed in violation of the statutes of New York and Pennsylvania. This judgment was affirmed by the Circuit Court of Appeals.

III. THE REASONS ALLEGED FOR REQUESTING ALLOWANCE OF WRIT OF CERTIORARI.

It is unnecessary to point out that petitioner has alleged no adequate reasons for requesting this court to review this case. It should be pointed out, however, that the statement on page 6 of the petition, that the case of *Snyder v. Snyder*, 172 N. Y. Misc. 204, 14 N. Y. S. (2d) 815 (erroneously cited by petitioner as 20 N. Y. S. (2d) 815), is the only case in the books dealing with an effort to evade a similar statute by charging that the promise was fraudulently made, is not correct. The case of *Sulkowski v. Szewczyk*, 255 App. Div. 103, 6 N. Y. S. (2d) 97, is precisely in point, a case in which a defendant promised to marry the plaintiff although he was already married, of which the plaintiff was ignorant. The suit charging deceit was dismissed by the Appellate Division of the New York Supreme Court, as in violation of the statute. The court said (p. 104):

> "If plaintiff's contention be correct, then any action based upon a breach of promise to marry could be turned into an action for misrepresentations by merely alleging that the promise of marriage was a sham, made solely for the purpose of taking advantage of the plaintiff."

IV. ARGUMENT.

The statutes both of New York and Pennsylvania forbid suits based upon breach of contracts to marry. Penalties are prescribed not only for the parties who file or threaten to file such suits, but upon the attorneys who act in their behalf.

Petitioner's suit was filed in direct violation of these statutes. The effort to escape their application by alleging that the promise was fraudulently made without intent to perform cannot succeed. Otherwise a plaintiff disappointed in defendant's failure to perform his alleged promise to marry her could in every case escape the application of the statute by alleging that he never intended to do so.

The rather vague suggestion in the petition that the suit was one brought simply to recover the value of gifts made and expenses incurred is clearly without basis, as an examination of the complaint demonstrates. Respondent submits herewith copies of his brief filed in the Circuit Court of Appeals which quotes the statutes in question, cites certain authorities bearing on the case and contains a more extended argument.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

T. R. WHITE,

Attorney for Respondent.